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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Petitioners

v.

COLUMBIA BROADCASTING SYSTEM, INC. CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES, INC.
Respondents

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL CABLE TELEVISION ASSOCIATION AS AMICUS CURIAE

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PRELIMINARY STATEMENT

The National Cable Television Association, Inc., pursuant to Rule 42 of this Court, is filing this brief as amicus curiae in support of the petition. Consents of the parties to the filing of this brief have been presented to the Clerk.

INTEREST OF AMICUS CURIAE

The National Cable Television Association, Inc., (NCTA) is the national trade association representing the cable television industry. Its membership includes about 1,300 cable television systems serving nearly 5,000,000 subscriber homes. This is about two-thirds of the television homes in the United States served by cable television systems.

In cooperation with 8 affiliated regional associations and 41 state associations, NCTA collects and publishes statistical and other information of interest to its members, the public and governmental agencies. NCTA acts on behalf of the industry before governmental regulatory agencies; it represents the industry in proceedings

in state and federal courts; and it has presented the industry's views before Congress.

The issue of copyright liability for the reception of television broadcast signals under the 1909 Copyright Act is vitally important to the cable television industry. The expansion of the copyright monopoly would carry with it the potential for litigation which could bankrupt the cable television industry in an attempt to satisfy the potentially huge amount of accrued damages. NCTA's interest in such a matter goes to the very heart of cable television's future as a new and developing communications technology.

THE CABLE TELEVISION INDUSTRY

Cable television systems (sometimes referred to as CATV) began in 1948 in mountain areas and rural areas where off-the-air reception was poor or unavailable. Members of the public found CATV service attractive as a way to receive TV broadcasts, and the number of homes using CATV service grew rapidly. By 1962 there were 742 firms which provided CATV service in 967 communities. In 1973 there are about 1,600 companies operating 3,000 CATV systems in over 6,000 communities.

There are now CATV systems in every state of the United States serving 8.2 million subscriber homes, or about 12% of the total number of television homes in the United States.

While there are some larger CATV systems in metropolitan areas, the average size of a CATV system is about 2,240 subscribers. Large numbers of CATV systems are found in the West and South and in the mountainous areas of the Northeast. There are about 1,800 communities where CATV permits have been issued but no construction started. There are a number of other communities where CATV applications are pending.

The issue of copyright liability is obviously of great importance to this relatively young industry. The ability of the public in many communities to use CATV or some other new technology in the future to receive television broadcasts will be determined by the outcome of this proceeding and the proceedings on the cross petition in No. 72-1633.

ARGUMENT

I. Judicial Expansion of the Statutory Monopoly under the Copyright Act would Defeat

the Realization of the Goal of the F.C.C. of Maximization of Television Service to all Communities.

Expansion of the copyright statutory monopoly under the rule devised by the court below to impose copyright liability for the reception and distribution of "distant signals" would frustrate the aims of the Communications Act of 1934 (47 U.S.C. §§ 151-609) and undermine the carefully devised rules of the F.C.C. to integrate CATV into its plan to accomplish those statutory aims. The Communications Act charges the Federal Communications Commission with the duty to "make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service" (47 U.S.C. §§ 151) and directs the Commission "to provide a fair, efficient, and equitable distribution of radio service" to each of the several States and communities (47 U.S.C. § 307(b)).

In 1952, the Commission adopted a plan allocating frequencies and locations where television broadcast

stations could be established.[1/] While one of the Commission's objectives was to provide service to as many communities as possible, electrical interference and the matter of station economic viability in small communities made it impossible for the Commission to provide any television service in many communities, especially rural communities. In other communities only one television station could be accommodated. Only in large metropolitan areas was it possible to provide enough stations to offer programming variety to the public.

The Commission set out to accomplish its statutory duty of maximizing television service to all communities in several ways. First, it set out to stimulate the establishment of UHF stations. Seventy UHF channels were added to the twelve original VHF channels for television broadcast use. When the use of these channels did not develop quickly, the Commission sponsored legislation requiring TV receivers to

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1/ Sixth Report and Order in Docket Nos. 8736, et al, 17 Fed. Reg. 3905 (1952).

be "all channel" (47 U.S.C. § 303(s)). It took other steps to try to provide service to hard-to-reach areas.2/ But none of these steps totally accomplished the Commission's objective.

It was only with the advent of CATV that a realization of the Commission's goal of bringing adequate television service to all of the nation's communities, particularly the smaller communities, became possible. In view of this development, the Commission concluded that CATV should be able to use microwave and other transmittal devices to carry television signals received off-the-air to smaller communities served by a CATV system. Otherwise, CATV systems could not offer the services to the public which the Commission envisaged. In contrast, and in derogation of the heretofore-recognized technical and policy-oriented melding of microwave with cable to form a CATV unit, the court below turned its definition of "distant signals" on the issue of whether a "transmittal device" such as microwave was necessary to bring the

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2/ See Cox, The Television Inquiry, The Problem of Television Service for Smaller Communities (1959).

signal from the point where it was received off-the-air to the cable distribution system in the CATV community.

The public interest in the use of microwave by CATV to bring signals received off-the-air to the cable distribution system was explored in a series of reports which began with proposed regulations in 1964 (29 Fed. Reg. 11458). The Commission's objectives on the use of microwave links by CATV systems is explained in its 1969 Report and Order[3] where the Commission said that it "has repeatedly noted the valuable contributions made by CATV in bringing service to underserved areas, and its promise as a means for increasing the number of outlets for community self-expression and for augmenting the public's choice of programs and types of service in all areas."[4] In order to enable CATV to better serve underserved areas, the Commission enlarged the general authorization of CATV to use microwave to bring broadcast signals from the point where

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3/ Report and Order in Docket No. 18452, 20 F.C.C.2d 415 (1969).

4/ Id. p. 418.

they were received to the CATV community (47 C.F.R. §§ 21.700 et seq.) to include the use of microwave to carry broadcast signals to CATV systems in outlying areas. These uses of microwave fall under the rule of the court below as to "distant signals."

In 1968 the Commission proposed its comprehensive plan to integrate CATV into, and make it play its part in, the national communications system.5/ The Commission's first action was to promulgate a rule requiring CATV systems with more than 3,500 subscribers to originate their own programming, thus serving as an outlet for local self-expression in order to supplement the satisfaction of television reception needs. First Report and Order in Docket No. 18397, 20 F.C.C.2d 201 (1969). There were a number of subsequent proposals and hearings culminating in the Cable Television Report and Order, 36 F.C.C.2d 143 (1972) where the Commission set forth its complete regulatory plan to use CATV as a positive tool in implementing the statutory directive

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5/ Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 F.C.C.2d 417 (1968).

of providing television service to all communities. Integral parts of that plan included the requirement that CATV systems provide equipment capable of handling 20 channels, two-way communications and extensive origination capacity. CATV systems were authorized to receive "distant signals" under carefully defined rules, so that CATV could provide minimum television service, especially in less populated areas. Thus CATV systems were authorized to receive "distant signals" necessary to provide 3 full network stations, plus one to three independent stations (depending on the size of the television market), plus an education station. (47 C.F.R. §§ 76.51 - 76.65.) To provide more local outlets, CATV systems in the top 100 television markets were required to make available channels for public use (local access channels), educational use and for the use of local governments. (47 C.F.R. § 76.251.)

The Commission recognized that reception of "distant signals" was an indispensable part of its plan to enable CATV to provide television service in less populated areas. The rule constructed by the court below would frustrate that objective and create a serious geographical discrimination so far as television service is

concerned. The large metropolitan areas with numerous television stations, and those communities whose location is such that a CATV system could provide minimum television service without the use of microwave, would be able to continue to receive that service under this Court's decision in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). However, all other areas now discriminated against under the existing Commission television station allocations plan because they cannot support a station or because interference will not permit a station to be established will continue to be discriminated against. A minimally acceptable service will be denied the hundreds of communities where minimum television service now depends on microwave.6/ In addition, the opportunity

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6/ The Television Factbook Service Volume, 1973-1974 Ed., a standard industry source book, shows that nearly 700 CATV systems use microwave to enable them to receive a network station. There is no data on the number of systems which have receiving antennas located outside the town and beyond the limits permissible under the rule of the court below.

to get any appropriate service at all will be denied to many communities which do not now have adequate television service.

The decision below would place in the hands of the copyright owners the power, when it suits their own economic interest, to set aside the Commission's carefully developed plan to provide television service "to all the people of the United States." Acceptance of this result would also negate the basic principle of the Communications Act that broadcasting must be "intended to be received by the public" (47 U.S.C. § 153(o)). The statute speaks of reception by "the public," not just that part of the public using a television antenna the copyright owner approves. Such a result will perpetuate the existing discrimination as to television service between communities, a discrimination which, we submit, is not justified under Fortnightly.

II. The Unworkable Rule of the Court Below Threatens the Viability of CATV Systems

The rule of the court below is so vague as to be unworkable. Virtually all of the adjectives used by the court

below in formulating its definition of "distant signals" will be the subject of litigation. Thus the meaning of "near" and "adjacent to" with regard to antenna location are certain to be the subject of dispute. The court below also shifted to the CATV system the burden of proof as to whether a distant signal was "equally receivable" on an antenna "of substantially equivalent sophistication" "in" or "near" the community. Each word portends potential litigation.

The overwhelming burden of litigation must be borne by a scattered and diffuse industry of 1,600 firms now engaged in providing CATV service. About half of these entities are small independent companies not affiliated with other CATV operations. The average size of a CATV system in the United States is 2,240 subscribers. At the normal charge of $6 per month for the service, such a system has an annual gross revenue of less than $150,000.

The magnitude of the threat to these systems is painfully evident. A television station on one channel will use an estimated 5,000 copyrighted programs per year. In addition there will be thousands of copyrighted musical programs broadcast. Assuming that the

minimum damages under the Copyright Act of $250 per infringement were assessed, the typical CATV system is facing a potential one-year liability of $1.5 million to $2 million per channel on which "distant signals" were received.

Even if the copyright owners were willing to negotiate licenses, the CATV system is in an intolerable position. There are no compulsory licenses "in bulk" except for ASCAP for some musical compositions. Thus the CATV operator in the small community -- or in the large community for that matter -- would be compelled to search out and negotiate with the copyright owner in advance of the broadcast. Television stations publish programs in advance, but they do not publish the names of the copyright owners. There is no device or way for the CATV system to locate the copyright owner, and certainly no way to compel him to negotiate once located. The bargaining power of a CATV system with an annual gross income of $150,000 is non-existent as against the networks and the movie companies and others controlling large blocks of copyrights. The lack of bargaining power is equally true for large operators, for even if a CATV operator were able to enter into agreements with all

but one copyright owner, the refusal of that one would destroy the service as to that program. Moreover, television stations frequently change announced programs, and in such circumstances the CATV system is in a hopeless position to find and negotiate with the copyright owner of the substituted program.

In addition, the existing pattern of program exclusivity rights creates an impregnable barrier for the cable industry. The tremendous bargaining power of network affiliates and major market independents, as fortified by the Commission's rules obliging CATV systems to recognize territorial exclusivity when carrying distant signals (47 C.F.R. § 76.151), would render meaningful bargaining impossible. A commentator has observed that "[i]t makes little sense for an individual copyright owner to brave the wrath of customers in a concentrated market to switch to a method of dealing which will hurt them and have no major impact on him."7/

7/ Chazen and Ross, Federal Regulation of Cable Television; The Visible Hand, 83 Harv. L. Rev. 1820, 1833-1834.

Thus unless a gigantic new "ASCAP" type organization were to be created to consist of all TV program suppliers -- a proposal which raises the gravest antitrust problems -- no system of negotiation and licensing would work. CATV systems now dependent on "distant signals" to provide minimal television service would cease to be viable, and the public in those communities would be denied "the maximum benefit of radio" which this Court said was the "avowed aim" of the Communications Act to secure "to all people of the United States." National Broadcasting Co., v. United States, 319 U.S. 190, 217 (1943).

CONCLUSION

The foregoing adverse consequences, we submit, are relevant to the question of whether the statutory copyright monopoly should be enlarged by judicial construction. They are particularly relevant in light of this Court's repeated holding that the primary objective of the Copyright Act is "to induce release to the public of the product of [the author's creative genius." United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948). Here, the author's work was released in the form of a broadcast for public reception. The rule of the court below would create and perpetuate a

discrimination as between members of the public with respect to television service depending on the location of their community. Such a result conflicts both with the Communications Act and the primary objectives of the Copyright Act, and it both evades and contravenes the rationale and result adopted in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). The decision and judgment below should be reversed.

Respectfully submitted,

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